Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

(3)

No. 94-47

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN H. CAMPBELL, M.D.,
Petitioner,

v.

SHARLISIA SUTTLE WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONER'S REPLY BRIEF

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September 19, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES PRESENTS AN IMPORTANT FEDERAL QUESTION	1
II. THE RATIONALE OF *LOUIS PIZITZ DRY GOODS CO., INC. v. YELDELL*, 274 U.S. 112 (1927), IS INAPPLICABLE TO THE PRESENT CASE	3
III. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Honda Motor Co., Ltd. v. Oberg, 512 U.S. ——, 114 S. Ct. 2331 (1994) 2, 5, 6
Louis Pizitz Dry Goods Co., Inc. v. Yeldell, 274 U.S. 112 (1927) 3, 4
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 2, 4, 5, 6, 7

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PETITIONER'S REPLY BRIEF

I. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES PRESENTS AN IMPORTANT FEDERAL QUESTION.

Contrary to the arguments advanced by respondent, the non-apportionment of punitive damages under the Alabama Wrongful Death Act raises issues of constitutional dimensions under the due process clause and the equal protection clause.

Dr. Campbell has not challenged the non-apportionment of punitive damages as being unwise or improvident, but has challenged the constitutionality of this rule. The mere fact that a state passes legislation to further a social policy does not insulate that legislation from a constitutional challenge. As respondent acknowledges in its brief, inappropriate social legislation may violate the constitution. Res. at 15.

In the present case, the non-apportionment of punitive damages under the Alabama Wrongful Death Act denied Dr. Campbell the procedural safeguards necessary to satisfy the Fourteenth Amendment. Issues regarding whether the Alabama Wrongful Death Act violates the due process clause are unquestionably raised by the non-apportionment of punitive damages among joint tortfeasors. The non-apportionment of punitive damages erases the procedural safeguards identified by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Furthermore, the non-apportionment of punitive damages creates the possibility that a tortfeasor will be unjustly punished as non-apportionment allows the plaintiff to arbitrarily execute damages without regard to each defendant's culpability. As this Court stated in *Honda Motor Co., Ltd. v. Oberg*:

> "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the state to deter future wrongdoing."

512 U.S. ——, 114 S. Ct. 2331, 2339 (1994).

In *Honda Motor Co., Ltd.*, this Court stated that the "abrogation of a well-established common law protection against arbitrary deprivation of property raises a presumption that its procedures violate the Due Process Clause." 512 U.S. at ——, 114 S. Ct. at 2339. Non-apportionment of punitive damages erases the procedural safeguards of an "individualized assessment" of damages by the jury and meaningful post-trial review. The abrogation of these procedural safeguards raises a presumption that the non-apportionment of punitive damages under the Alabama Wrongful Death Act violates the due process clause and creates a federal question warranting this Court's review.

Furthermore, the non-apportionment of punitive damages denied Dr. Campbell equal protection of the laws.

Non-apportionment of punitive damages recognizes unreasonable classifications among defendants in cases awarding punitive damages. The non-apportionment of punitive damages is not rationally related to the preservation of human life under any conceivable circumstances. As non-apportionment of punitive damages raises a constitutional question under the equal protection clause, review by this Court is appropriate.

In its decision, the Supreme Court of Alabama held that the non-apportionment of punitive damages does not violate the due process clause or the equal protection clause. The Supreme Court of Alabama spent several pages of its opinion addressing these issues. The Supreme Court of Alabama held that the non-apportionment of punitive damages is constitutional because the non-apportionment of punitive damages is rationally related to the preservation of human life. In its opinion, the Supreme Court of Alabama has decided federal questions concerning the due process clause and the equal protection clause. Because the Supreme Court of Alabama has decided federal questions concerning the due process clause and the equal protection clause, review is warranted by this Court.

II. THE RATIONALE OF *LOUIS PIZITZ DRY GOODS CO., INC. v. YELDELL*, 274 U.S. 112 (1927), IS INAPPLICABLE TO THE PRESENT CASE.

In *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*, 274 U.S. 112, an employer was found liable and assessed punitive damages under the Alabama Wrongful Death Act for the negligence of its employee. The employer argued on appeal that the imposition of liability and punitive damages without personal fault denied him the due process of law. This Court held that to impose liability upon an employer based upon the principle of respondeat superior, regardless of fault, did not violate the due process clause. This Court explained its holding by noting that the principal is in a position to prevent the

negligence of the agent. *Id.* at 116. This Court stated that it does not violate the due process clause to impose liability "upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented." *Id.*

The rationale of *Pizitz*, is also discussed in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In *Haslip*, punitive damages were imposed on an insurance company for the fraudulent acts committed by its agent. This Court held that the imposition of punitive damages on the insurance company did not violate the due process clause. This Court stated that the imposition of punitive damages on the insurance company creates a financial incentive for the insurance company to prevent the agent's fraud. *Id.* at 14. Furthermore, the Court stated that "imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented' ". *Id.* (citing *Pizitz*, 274 U.S. 112, 116).

The rationale of these cases is that a principal is in a position to guard against and prevent the negligent, wanton, or intentional acts of its agents. By imposing punitive damages on a principal for the acts of its agent, there will be a strong financial incentive for the principal "to guard substantially against the evil to be prevented." Respondent argues that this rationale is applicable to the present case and that the non-apportionment of punitive damages does not violate the due process clause.

The rationale of *Pizitz* and *Haslip* is not applicable to the present case. In the present case, the acts of each defendant were independent and unrelated, and neither defendant was in a position to prevent the wrongful act of the other tortfeasor. While a principal may have the right to exercise control over an agent to prevent a wrong, one defendant is not in a position to prevent the unrelated

wrongful act of a totally independent tortfeasor. The principle of respondeat superior does not exist between two independent tortfeasors and cannot be used to justify the non-apportionment of punitive damages as constitutional. As an individual tortfeasor cannot prevent the acts of another individual tortfeasor, non-apportionment of punitive damages punishes the tortfeasor in part for acts he did not commit and violates the due process clause. It is clearly a violation of a defendant's constitutional rights to punish him for conduct that he did not commit nor could he have prevented.

III. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE.

This Court's opinions in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, and *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ——, 114 S. Ct. 2331, indicate that an award of punitive damages violates the due process clause unless there are procedural safeguards in the form of proper jury instructions and post-trial judicial review of the amount awarded. This Court held in *Honda* that the abrogation of a well-established procedural safeguard against arbitrary deprivation of property raises the presumption that a procedure violates the due process clause. *Honda*, 114 S. Ct. at 2339. Furthermore, this Court held in *Honda* that "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Honda*, 114 S. Ct. at 2340 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358 (1970)).

The non-apportionment of punitive damages eliminates the procedural safeguards of proper jury instructions and post-trial judicial review of the amount awarded. This

Court held in *Haslip* and in *Honda* that a proper jury instruction is a well-established procedural safeguard. This Court held in *Haslip* that a proper jury instruction reasonably accommodates the defendant's interest in rational decision-making while allowing "meaningful individualized assessment of appropriate deterrence and retribution." 499 U.S. at 20. The "individualized assessment of appropriate deterrence and retribution" is abrogated by the non-apportionment of punitive damages. The non-apportionment of punitive damages forces the jury to return a general verdict against all defendants and does not allow the jury to apportion punitive damages among the defendants in regard to their culpability. Although the jury is instructed to make an individualized assessment of damages based on each defendant's culpability, the jury returns a general verdict representing the culpability of all defendants. In turn, the plaintiff is able to execute any of or all of the verdict against any defendant found liable, including the least culpable. A situation is created in which there is no longer individualized assessment of damages by the jury, but arbitrary decision making by the plaintiff in executing the judgment. As a defendant may be punished in part for the conduct of another defendant, this creates the possibility that a defendant may be unjustly punished.

Respondent acknowledges that the judgment returned against Dr. Campbell does not represent an "individualized assessment of appropriate deterrence and retribution" in relation to Dr. Campbell's culpability, but argues that the general verdict was "individualized" by the post-trial review of the trial court and the appellate court. Respondent argues that because the trial court and appellate court found the judgment against Dr. Campbell appropriate, Dr. Campbell received an "individualized assessment". Respondent's analysis is inaccurate.

The non-apportionment of punitive damages eliminates the procedural safeguard of proper jury instructions and allows the arbitrary deprivation of property. The non-

apportionment of punitive damages forces the jury to return a general verdict and deprives the defendant of an "individualized assessment of appropriate deterrence and retribution". Furthermore, adequate post-trial review by the trial court and the appellate court cannot serve as a substitute for a proper jury instruction. This is especially true in the present case where the $3,000,000 judgment against Dr. Campbell was not determined by the jury's "individualized assessment of appropriate deterrence and retribution", but by a settlement between the hospital and the respondent which fixed the hospital's liability at $1,000,000. After being instructed that it could not separately assess damages against the defendants, the jury returned a general verdict of $4,000,000 against the hospital and Dr. Campbell, and did not assess the $3,000,000 judgment against Dr. Campbell. The $3,000,000 judgment against Dr. Campbell does not represent an "individualized assessment" of Dr. Campbell's guilt and cannot be validated as such by the review of the trial court and appellate court. To sanction this judgment as an "individualized assessment" of Dr. Campbell's culpability would be pure speculation.

Furthermore, when multiple defendants are involved in the post-trial proceedings there can be no adequate post-trial review of the judgment. Just as the verdict is not based on the sole conduct of one defendant, neither the trial court nor the appellate court can set aside the judgment based on one defendant's conduct. The factors identified in *Haslip* which the trial court and appellate court are to consider in reviewing an award must be assessed in regard to all defendants and applied to the general verdict returned against all defendants.

Respondent also argues that "[b]y alerting people to the fact that even a 1% contribution towards the death of a human being can result in liability for the full measure of damages assessed by the jury, Alabama's Wrongful Death Act serves as an especially powerful deterrent". Res. at 23. Respondent's assessment of the non-

apportionment rule epitomizes why the non-apportionment of punitive damages is unconstitutional. To think that a general verdict of $1,000,000, $5,000,000 or $10,000,000 could be returned against two defendants and that the entirety of that verdict could be executed against a defendant that is one percent culpable is an idea that shocks the conscience. The thought is contrary to the canons of decency and the fundamental notions of justice. The possibility is created that the judgment entered against a defendant will bear no rational relationship to his guilt. To punish a defendant not in relation to his culpability, but based in part on the conduct of others creates an arbitrary deprivation of property and violates the due process clause.

CONCLUSION

The Court should grant the Writ of Certiorari to review the judgment and opinion of the Supreme Court of Alabama in *Campbell v. Williams,* No. 1920826 entered February 18, 1994.

Respectfully submitted,

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